No. 11,573

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER STEELE,

Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, et al.,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

SUPPLEMENTAL BRIEF FOR APPELLANT.

LEO R. FRIEDMAN,
935 Russ Building, San Francisco 4,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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SUPPLEMENTAL BRIEF FOR APPELLANT.

At oral argument Judge Denman queried as to whether the language of the removal statute (28 U. S. C. A. 74) reading as follows:

> "* * * any right secured to him by any law providing for the **equal** civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States * * *"

did not mean, in view of the word "equal", that no case fell within the statute unless some law of the state made an unlawful discrimination between persons similarly situated.

The writer answered this query by stating that he did not think the statute referred merely to state action which denied the equal protection of the laws to some while granting it to others; but, in his opinion, that the statute referred to state action which denied to all persons in the state a right that was to be equally enjoyed by all persons throughout the United States. While this answer was and is correct it was not fully or properly stated.

An entirely correct answer would be that the removal statute operates in all cases where the state, by law, has abridged a privilege or immunity of a citizen of the United States.

THE MANNER IN WHICH THE DENIAL OF THE RIGHT HEREIN WAS RAISED.

While much was said at oral argument as to due process of law, a reading of the record discloses that this was only one of the grounds urged for the removal.

The complaint (Par. 1, R. 2) starts out with the allegation: "That at all times herein mentioned the complainant, Alexander Steele, was and now is **a citizen of the United States.**"

The removal petition (R. 11) contains the same allegation as to United States citizenship.

The petition, after alleging the unlawful entry into Steele's home and the taking of his papers by the police officer, then alleges that such action was "in

violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States **and** in violation of petitioner's right to be secure in his person, house, papers and effect against unreasonable searches and seizures." Thus, it here is alleged that the unlawful search and seizure violated two rights of Steele, as a citizen of the United States.

The removal petition further alleged (R. 18) that the evidence so secured by the officer was procured in violation of Steele's right "to be secure against unlawful search and seizure"; and that the use of such evidence against him at his trial "will result in said petitioner being tried in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States."

The further contention of Steele's is summed up in paragraph XI of the removal petition as follows (R. 21):

> "That by reason of the foregoing matters and things petitioner is being denied and cannot enforce in the judicial tribunals of the State of California and/or in the part of the State where such criminal proceeding, aforesaid, is pending against him, to wit: in the City and County of San Francisco, State of California, **all of the rights secured to him by the laws of the United States providing for the equal civil rights of citizens of the United States** and is being and will be deprived of **the equal protection of the law** and of due process of law as the same are assured and guaranteed to him by section 1 of the Fourteenth Amendment to the Constitution of the United

States, which provide that **'no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States,** nor shall any state deprive any person of life, liberty or property without due process of law or **deny to any persons within its jurisdiction the equal protection of the law.'** And is further being deprived and denied and will be deprived and denied the rights secured unto him by section 1977 of the Revised Statutes of the United States as set forth in Title 8, U.S.C.A. sec. 41. And that in addition thereto defendant is being and will be deprived of a fair and impartial trial as the same is known at common law and guaranteed to all of the people of the State of California by the Constitution of the United States.''

Thus, Steele not only urged that the removal should take place under the due process clause, but also advanced additional grounds covering all of the first division of the 14th Amendment.

THE PHRASE ''ANY LAW PROVIDING FOR THE EQUAL CIVIL RIGHTS OF CITIZENS OF THE UNITED STATES,'' INCLUDES ANY RIGHT, PRIVILEGE OR IMMUNITY OF A CITIZEN OF THE UNITED STATES.

We will now demonstrate that the foregoing phrase means each of the following things: (a) That a civil right of a citizen of the United States is a right that must be observed and protected throughout and by each of the States of the Union; (b) That such a right may be declared by the Constitution or a positive law of the United States, or by a law or Consti-

tutional provision protecting a right existing before and at the time of the adoption of the Constitution.

There is a distinction between citizens of the United States and citizens of a state. Each citizenship has its own privileges and immunities. A state may abridge the privileges and immunities of state citizens, but cannot abridge the privileges or immunities of citizens of the United States. (*The Slaughter-House* cases, 83 U. S. 36, 73 to 77).

A privilege or immunity of Federal citizenship need not find expression in any positive statute of the United States before it will be protected by the 14th Amendment:

> "The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but **every prohibition implies the existence of rights and immunities,** * * *"
>
> *Strauder v. Virginia,* 100 U. S. 303, 25 L. ed. 664, 666.

and later on the same page the Court in the *Strauder* case states:

> "A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress."

Then the Court, on authority of *United States v. Reese,* 92 U. S. 214, holds that the removal statute is the appropriate method for protecting such a right guaranteed by the 14th Amendment.

It should be noted that while every right covered by the "due process clause" is not included in the "privilege or immunity clause", **every denial of a privilege or immunity of a citizen of the United States also involves a lack of due process.** This distinction becomes important as many of the fundamental rights of citizens of the United States are discussed in cases where the only constitutional question involved was one raised under the due process clause.

The Supreme Court has never attempted to define the privileges and immunities of citizens of the United States, though a partial list of such things was set forth in the *Slaughter-House* cases, supra, at p. 79; but in that case and many following, the Court stated that such privileges and immunities are such as "owe their existence to the Federal Government, its national character, its Constitution, or its laws." This same general rule has been re-stated in many subsequent cases, of which we cite but two of the more recent ones:

Breedlove v. Suttles, 302 U. S. 277;
Snowden v. Hughes, 321 U. S. 1.

As indicative of the character of the privileges and immunities of citizens of the United States as protected by the Fourteenth Amendment, we call attention to the following matters and things which, despite the ruling in *Twining v. New Jersey,* 211 U. S. 78, holding that the first eight Amendments are not incorporated within the Fourteenth Amendment, are now held to be protected by the Amendment.

In *Hague v. CIO,* 307 U. S. 496, it was held that the right to peaceably assemble and discuss matters of national concern was a privilege of United States citizenship. Thus, at page 512, the Supreme Court stated:

> "Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, merely secured existing rights against state abridgement, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects."

In *Schneider v. Irvington,* 308 U. S. 147, 160, it is held that freedom of speech and freedom of the press as secured by the First Amendment from abridgement by the United States are secured to all persons by the Fourteenth Amendment against abridgement by a state.

In the *Slaughter-House* cases, supra, it is held that the privilege of the writ of habeas corpus is a right of a citizen guaranteed by the Federal Constitution.

The right of freedom of religion is also an attribute of Federal citizenship. *Everson v. Board of Education,* 91 L. ed. Ad. Op. 472, 476, 479.

The general character of privileges and immunities of citizens of the United States being thus outlined, we come to the question of whether the right to be secure from unreasonable search and seizure falls within the constitutional provision.

In our Opening Brief, we set forth many cases dealing with the character of this right and we repeat some of the language which we have already quoted.

In *Gouled v. United States,* 255 U. S. 298, the Court points out that the right to be secure from unreasonable search and seizure is different from the right to be accorded due process of law. Its language is as follows:

> "The effect of the decisions cited is that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that **they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen —the right, * * * to due process of law.**"

We have already referred this Court to the recent decision in *Harris v. United States,* 91 L. ed. Ad. Op. 1013, 1016, where the foregoing language in the *Gouled* case is quoted with approval.

In *Boyd v. United States,* 116 U. S. 616, the Court holds the right to be of "the very essence of constitutional liberty and security".

In *Go-Bart Importing Co. v. United States,* 282 U. S. 344, the Court states:

> "Since before the creation of our government, **such searches have been deemed obnoxious to fundamental principles of liberty.** They are denounced in the constitutions or statutes of every state in the Union. Agnello v. United States, 269

> U. S. 20, 33, 70 L. ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

On page 42 of our Opening Brief we summarized the decisions of the Supreme Court emphatically stating the nature of the right to be "indispensible to the 'full enjoyment of personal security, personal liberty and private property' * * * to be regarded as the very essence of constitutional liberty" (*Harris v. United States,* supra; *Gouled v. United States,* supra); that it is as an "indefeasible right of personal security" (*Boyd v. United States,* supra); and a principle "of humanity and civil liberty." (*Weeks v. United States,* infra).

Any right that is the very essence of constitutional liberty, indefeasible and indispensible, and a principle of civil liberty, must be a right and privilege adhering to every citizen of the United States. The War of the Revolution was fought to procure such rights and our subsequent wars fought to preserve them. If such be not rights of United States citizenship, then there is no protection, constitutional or otherwise, for their protection and enforcement.

Turning back to *Boyd v. United States,* supra, the announced nature of the right was derived from the

history leading up to the adoption of the Fourth Amendment and our Supreme Court, among other things stated (p. 625):

> "The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and **the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.'**
>
> **These things** and the events which took place in England immediately following the argument about writs of assistance in Boston **were fresh in the memories of those who achieved our independence and established our form of government.**"

Compare the history of events leading up to the Fourth Amendment as set forth in the *Boyd* case, with the history of events leading up to the adoption of the First Amendment as set forth in the *Everson* case, supra, beginning with page 476.

As the right to be secure from unreasonable search and seizure was the most prominent event which inaugurated resistance of the Colonies to the oppressions of England and resulted in the birth of Independence and the first act leading up to the Revolutionary War, how can it be said that such a right is not a fundamental principle of American citizenship?

If the right to be secure from unreasonable search and seizure was one of the things fought for in the Revolutionary War, then it perforce must be a right secured by that war and to be enjoyed by all citizens of the United States.

See also *Weeks v. United States,* supra, p. 390, where the history is again discussed.

Lastly, we discuss the cases dealing with the right of removal under the statute.

In *Strauder v. West Virginia,* 100 U. S. 303, 10 Otto 303, a negro was indicted for murder in the state Court. He sought removal to the federal Court on the ground that being a former slave, he believed he could not have the full and equal benefit of all the laws in the same degree that such benefits would be enjoyed by white citizens. The Court in speaking of the Fourteenth Amendment held that while the language relating to the privileges and immunities was prohibitory, they contained a necessary implication of a positive immunity or right. The Court held that the laws of West Virginia discriminated against negroes; that the removal statute was a proper exercise of the federal power; that the removal petition was sufficient and

transferred the cause to the federal court and that the action of the state Court in proceeding to trial, after the filing of removal petition, was error.

In *Ex parte Virginia,* 100 U. S. 313, 10 Otto 313, another removal was sought. The general doctrines announced in the *Strauder* case were upheld. The state Court had refused to surrender jurisdiction and the Supreme Court upheld the state Court in this instance on the ground that the statutes of Virginia did not deny him any right but only the manner in which they were being executed.

In *Neal v. Delaware,* 103 U. S. 370, the defendant had been indicted for rape in the state Court. He filed a petition for removal to the federal Court. The state denied the removal and it was upheld on the ground that there was no law or constitutional provision of the state denying any federal right guaranteed by the Constitution.

In *Kentucky v. Powers,* 201 U. S. 1, we again had a case where the Court draws a distinction between the manner in which state officers enforce a law and the law of the state itself. The Court held that the right must be one denied by the constitution or laws of the state, otherwise there could be no removal under the statute. The Court closed its decision by distinguishing between the right of removal before trial and the ability to have a constitutional right protected after trial and in so doing, held that where the constitution or laws of the state denied one a fundamental right of United States States citizenship, the case can

be removed before trial under the removal statute, but where a constitutional right is denied other than by the constitution or laws of the state, it can only be reviewed in the federal Court after trial and from a ruling of the highest Court of the state refusing to enforce such right.

As we have argued, the Constitution of California, as construed by the highest Court of the state, not only denied the existence of the right contended for but denies any process or procedure in the state Courts by which the right can be protected prior to trial or availed of in any manner. In this regard, we refer the Court to the case of *Weeks v. United States,* supra, where the right to be placed in the position one occupied prior to unreasonable search and seizure is upheld and distinguished from a case where no motion to suppress the evidence was made prior to trial.

The appellees argue that nothing could be gained by removing this case to the federal Court because in the latter Court the right could not be protected as the unlawful search and seizure had not been made by a federal officer. This is completely answered by the case of *Tennessee v. Davis,* 100 U. S. 257, 25 L. ed. 648, 653, where it is held that on removal, the federal Court will adopt and apply the laws of the state, according to the defendant any defense or right guaranteed him by the Constitution or laws of the United States.

THE CONSTITUTIONAL PROVISION, AS CONSTRUED BY THE CALIFORNIA SUPREME COURT, DENIES THE EQUAL PROTECTION OF THE LAWS AND MAKES AN UNLAWFUL DISCRIMINATION BETWEEN CITIZENS.

The Supreme Court of California has so construed the State Constitutional provision as to deny to all within the state boundaries the right to enforce or protect in any manner the privilege and immunity to be secure from unreasonable search and seizure. In so doing the state denied the equal protection of the laws and has made an unlawful discrimination between persons occupying the same position and entitled to enjoy the same rights.

The foregoing is manifest if we compare the rights of persons who have been subjected to an unreasonable search and seizure without any warrant having been issued and those who have been so subjected although a warrant had been issued.

Sections 1523 to 1541 of the California Penal Code provide for the issuance of search warrants and the procedure to be followed on the return thereon.

Sections 1524 and 1525 provide for the instances in which such a warrant may be issued and that it cannot "be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched."

Section 1535 provides that the officer executing the warrant must give a receipt for the property taken to the person from whom it was taken.

Section 1537 provides that the officer must forthwith return the warrant, after execution, to the magistrate together with a written inventory of the property taken.

Section 1539 states that "if the grounds on which the warrant was issued be controverted, he (the magistrate) must proceed to take testimony in relation thereto * * *"

Section 1540 provides:

> "If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

Here we have a procedure where, **if the officer proceeds in a lawful manner and takes property under a search warrant,** the person from whom the property was taken has his day in Court and if it be determined that the search was unreasonable, in that no probable cause existed for the issuance of the warrant, the property must be returned to him.

Compare this with an instance **where the officer proceeds in an unlawful manner without a search-warrant,** and unlawfully breaks into the home of a person and takes property therefrom. In this instance the owner of the property has no redress; he cannot by motion or otherwise have his day in Court; he cannot have it determined whether the search was or was not unreasonable; he cannot have his property restored to him although it be admitted that the search and

seizure was both unlawful and unreasonable; he is helpless and the property, which would have been promptly returned to him if the search had been conducted under a warrant, is withheld from him and used as evidence against him in a criminal prosecution.

All persons within the State of California are entitled to the full protection of the constitutional right and to equal opportunity to preserve and vindicate that right. All persons are entitled to be secure in their homes, papers and effects from unreasonable search and seizure.

To provide a means for enforcing the right where the state officers proceed in a lawful manner and to deny any means for enforcing the right where the officers proceed in an unlawful manner, results in a denial of the equal protection of the laws and constitutes an unlawful discrimination between persons identically situated and entitled, without reservation, to the same rights and remedies.

Dated, San Francisco,
October 18,1947.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant.